



# **Commonwealth of Massachusetts State Ethics Commission**

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## **CONFLICT OF INTEREST OPINION EC-COI-89-7**

### **FACTS:**

You recently completed a five-year term as Secretary of the Executive Office of Environmental Affairs (EOEA). As Secretary of EOEA, a cabinet level agency, you had responsibility for implementing and overseeing all state policies aimed at preserving, protecting and regulating the natural resources and the environmental integrity of the Commonwealth, and for supervision of all departments that comprise EOEA the Metropolitan District Commission (MDC), the Massachusetts Water Resources Authority (MWRA), the Department of Environmental Quality Engineering (DEQE), the Department of Environmental Management (DEM) (including the Division of Water Resources and the Water Resources Commission), the Department of Food and Agriculture (DFA), and the Department of Fisheries, Wildlife and Recreational Vehicles (DFW&RV) -- as well as the three operating units within EOEA that reported directly to the Secretary: Division of Conservation Services (DCS), the Massachusetts Environmental Policy Act and Review Unit (MEPA), and the Office of Coastal one Management (CZM).

During your term as EOEA Secretary, you regularly met and worked with all of these agencies on the development of their rules and regulations and of specific environmental policies, including policies with respect to the disposal of solid, hazardous and radioactive wastes. In connection with the work of the three EOEA operating units, you personally participated in one way or another in the decisions on most of the particular matters which came before them. In the case of the departments, however, the specific application of rules, regulations and policies to particular situations was typically the responsibility of and performed by the department heads themselves, with little or no participation by you.

The most significant exception to this departmental pattern was the MRA, on whose Board of Directors you served, by virtue of its enabling act, as ex officio member and Chairman from its creation in January, 1985 through December 2, 1988. In that capacity, you participated in the decisions regarding all of the MWRA's activities, particularly its operation of the wholesale water and sewer functions for forty-three cities and towns, including the City of Boston, in eastern Massachusetts, the launching of its multi-billion dollar Boston Harbor clean-up program, and the development of short and long-term plans for protecting and augmenting the water supply for eastern Massachusetts.

As of January 3, 1989, you became Of Counsel to the law firm of Choate, Hall & Stewart (the firm), at 53 State Street, Boston, Massachusetts. The firm, a general partnership consisting of fifty- five partners, three of counsel and eighty-five associates, is engaged in the general practice of law, with emphasis on litigation and on corporate, securities, banking, creditors' rights, tax, real estate, health care, trust, probate, labor, land use and environmental law. You will not be described or held out by the firm as a partner of the firm. Your financial arrangement with the firm will involve an annual fixed salary, with a prospect of a possible merit bonus (not measured by profits) at the end of each year's employment. You will have no "equity" interest of share in the profits of the firm (including any profits from business which you may originate); will not be responsible for contributing to any losses or to any capital or operating expenses; will not have any interest in the assets of the firm; and will not have a vote on partnership decisions, although it is anticipated that you will attend most partnership meetings and functions and participate in discussions of matters affecting the area of practice in which you will be involved. As is the firm's policy with respect to lawyers who become "Of Counsel" to the firm, after a period of anywhere from one to three years, you shall, if you choose to remain with the firm, become eligible to request consideration for partnership on the same basis as all other candidates for partnership. No promises or guarantees of partnership have: however, been made to you.

As "of counsel" to the firm, you shall be engaged full-time in assisting and advising the firm's Land Use and Environmental Law Practice Group, under the direction of its Chairman, Donald L. Connors. This group's practice involves all aspects of the regulation of the use and development of land and other natural resources and consists of advising public and private clients on local, state and federal laws, assisting them in obtaining required licenses and permits for their desired activities, assisting them in complying with applicable laws and regulations, and assisting them with respect to environmental policy analysis, initiatives, and legislation/regulation. It is presently anticipated that your legal efforts will concentrate on assistance to clients concerning solid waste management and facility operations but will also involve advice to clients regarding compliance with land use and environmental legal requirements and assistance with the firm's land use and environmental consulting practice. Because of your concentration in this area of practice, it is likely that your official title will be "environmental counsel" to the firm, rather than merely "of counsel."

You are now a former state employee and seek guidance regarding the application of G.L. c. 268A to the work you propose to do for the firm's Land Use and Environmental Law Practice Group.

#### **QUESTION:**

What are the general principles and definitions under G.L. c. 268A that would apply to you as a former state employee?

#### **ANSWER :**

You will be subject to the limitations described below.

## **DISCUSSION:**

Upon your departure from EOEA, you became a former state employee. As a former state employee, five paragraphs of G.L. c. 268A are relevant to your situation.

### **Section 5(a)**

This paragraph prohibits you from receiving compensation from or acting as attorney or agent for anyone other than the Commonwealth in connection with any particular matter[1] in which you previously participated[2] as Secretary of EOEA.

### **Section 5(b)**

This paragraph prohibits you from personally appearing, during a one-year period following the completion of your EOEA services before any state court or state agency, in connection with any particular matter which was under your official responsibility during a two-year period prior to your departure from EOEA.

A "particular matter" includes any application, submission, request for ruling, decision or determination. G.L. c. 268A, s.1(k). The environmental impact review process on a particular project, culminating in an environmental impact report, is a particular matter within the meaning of the statute. Although the Secretary makes several different decisions at different stages in the process of producing the report, each of these decisions is not a different particular matter in that each is a related step in the development of the final environmental impact report. We have indicated that an entire project is not one particular matter where the different phases of the project are distinct and distinguishable, see EC-COI-85-22, but we decline to extend that analysis to the various stages of development of an environmental impact report where the decisions made, although technically distinct, clearly involve the same particular matter. See EC-COI- 84-31.

Participate is defined in G.L. c. 268A, s.1(j) as to participate in a particular matter "personally and substantially." Not all participation by a government employee will be deemed personal and substantial. "In those instances where a government employee is involved in ministerial activity not directly affecting a particular matter, the conduct may not constitute substantial participation as defined in the statute." In the Matter of John Hickey, 1983 SEC 158, 159.

We have indicated that participation that is ministerial and after the fact is not substantial. The forwarding of a letter, for example, is not personal and substantial, In the Matter of Paul H. Sullivan, 1988 SEC 340 (Commission Adjudicatory Docket No. 319), and that providing general information to decision-makers may not constitute personal and substantial participation in the decision eventually made, EC-COI-82-82. Participation that is superfluous, nondeterminative, or not part of the decision-making

process is more likely to be deemed ministerial. See, e.g., EC-COI-82-138; EC-COI-82-46.

Participation in discussions involving a particular matter is not ministerial, however. See *Graham v. McGrail*, 370 Mass. 133 (1976). Approving a recommendation made by a subordinate is not ministerial. See EC-COI-86-6; EC-COI-86-3). The act of merely assigning complete responsibility for reviewing and approving or responding to filings by parties involved in the environmental impact review process to one of your undersecretaries would not be deemed personal and substantial participation in that matter on your part in that you would play no role in the decision-making process. Similarly, the fact that the undersecretary would prepare and sign, over your typewritten name, the responsive document without any further involvement or oversight by you is not enough for you to be deemed to have participated in the matter. Your typewritten name, in this context, would only indicate that you had authorized them to respond. Were you to play an active oversight role, however, your awareness of and tacit approval of the work of your direct subordinates could then constitute participation within the meaning of the statute. See, EC-COI-79-57.

You would have had official responsibility for all MEPA matters assigned to your undersecretary, however. We have indicated that something a subordinate does may still be within your official responsibility. See, e.g., EC-COI-85-11; In the Matter of Donald P. Zerendow 1988 SEC 352 (Commission Adjudicatory Docket No. 357). Official responsibility turns on the authority to act, and not on whether that authority is exercised. EC-COI-84-48; EC-COI-83-37; Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U. Law Rev. 299,321(1965). The fact that these comments would be signed over your name would be further evidence that the matter was within your official responsibility as were all particular matters filed in the EOEA and the departments that comprise EOEA, including the independent agencies like the MDC and the MWRA, during your tenure as Secretary. This is Consistent both with the broad legislative mandate the Secretary receives to supervise the entire EOEA, see G.L. c. 21A, s.1, and the general intent of the conflict law that section 5(b)'s restrictions become greater, the greater the authority found in the former state employee's position.

To summarize the restrictions placed on you by paragraphs 5(a) and (b), then, you are forever barred from acting as agent or attorney for anyone other than the state in connection with particular matters in which you personally participated as the Secretary, and you are barred for one year from appearing before the state in connection with those particular matters that were within your official responsibility, i.e., all matters pending within EOEA and its departments, during your last two years of service as the Secretary.

#### Section 5(e)

This paragraph prohibits you from acting as legislative agent[4] for anyone other than the Commonwealth or a state agency before any EOEA agency or unit within one year of the time you left EOEA. See EC-COI-85-52. You may, as a result, act as legislative

agent for someone other than the Commonwealth before any non-EOEA agency, provided that the other provisions of section 5 are not violated. You should note that the Commission has indicated that acting as a legislative agent includes any act done to promote, oppose or influence legislation. In the Matter of Cornelius J. Foley, Jr, 1984 SEC 172. This broad definition of lobbying promotes section 5(e)'s purposes whether or not the former state employee involved is a former legislator or legislative staff member. The potential for abuse of special knowledge of or access to a state agency is not limited to former legislators or legislative staff members.

#### Section 5(c)

This paragraph prohibits any partner you might have, for one year period following the termination of your employment the Commonwealth, from engaging in any activity in which you are prohibited from engaging by section 5(a) of the statute. In that you will not be a partner of the firm, the partners of the firm will not be Constrained by this section of the statute.

Although the term "partner" is not restricted to those who enter into formal partnership agreements, EC-COI-80-43, we find nothing in the "of counsel" or "environmental counsel" relationship you describe that would cause us to impute partnership status to you. In particular, the receipt of a merit bonus of the size normally awarded to an associate and your non-voting attendance and participation in partnership meetings (a role consistent with that played by senior associates at the firm) will not, without more, trigger partnership status. Your identification as "of counsel" or "environmental counsel" on firm documents and your salary arrangement indicate that section 5(c) does not apply to the firm. See EC-COI-88-11.

#### Section 23(c)

This paragraph prohibits you from disclosing confidential information which you acquired as the Secretary, or from engaging in professional activities which would require your disclosure of such confidential information. We have previously defined "confidential information" as information that is unavailable to the general public. EC-COI-85-23. This is to be distinguished from information that, although not well known, is a matter of public record.

DATE AUTHORIZED: February 8, 1989

\*Pursuant to G.L. c. 268B, s.3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws

related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

[2] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(j).

[3] " Official responsibility," the direct administrative or operating authority, whether intermediate or final and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, s.1(i).

[4] The statutory definition of legislative agent contained in G.L. c. 3, s.39 includes "any person who for compensation or reward does any act to promote, oppose or influence legislation."